presented as to whether Congress, with plenary control over citizenship, should be accorded differential respect due to a coordinate branch of government in extending protection to the unborn and partially born as arguably following under the penumbra of "posterity."

2. An important and compelling federal question is presented as to whether Unconstitutional conduct can be justified by widespread and long use because, with respect to the Constitution, *stare decisis* is of less importance than in other areas, and therefore, the *holding* of *Roe v. Wade* and its *progeny* is not necessarily binding as inapposite to the issues raised.

3. An important and compelling federal question is presented as to whether, in light of the fact that neither the 5th nor 14th Amendment define person-hood, and this Court's recognition that aliens and artificial persons are entitled to protection, that it is an anomaly not to find unborn and partially born children are entitled to protection in light of the words found in the Preamble "to secure the blessings of liberty to ourselves and our Posterity" that appear to include unborn and partially born children as present members of "Posterity" an understanding consistent with the intent of the framers, and the common law, that unborn and partially born children are persons in being, therefore protected by the Constitution.

4. Based upon the foregoing, this court should grant certiorari and *distinguish Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny* as inapposite to the issues raised herein, reverse the decision of the court below and remand for further proceedings not inconsistent with this Court's views.

REASONS FOR GRANTING CERITIORARI

I.
AN IMPORTANT AND COMPELLING FEDERAL QUESTION IS PRESENTED AS TO WHETHER CONGRESS, WITH PLENARY CONTROL OVER NATU-

RALIZATION, SHOULD BE ACCORDED DEFERENTIAL RESPECT.

The U.S. Supreme Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. *Carlisle v. United States*, 517 U.S. 416, 426 (1996).[4] While Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, *e.g., Palermo v. United States*, 360 U.S. 343, 345-348 (1959), it may not supersede the High Court's decisions interpreting and applying the Constitution. *See generally, City of Boerne v. Flores*, 521 U.S. 507, 517-521, *Dickerson v. U.S.*, 530 U.S. 428 (2000).

This case comes to this court in a materially different posture than *Dickerson*. There, Congress attempted to *overrule* the *Miranda* decision and redefine defendants' rights under the 5th Amendment in a manner inconsistent with an opinion of this Court. In this case, Congress has, by its authority under Article I, § 8, clause 4, apparently extended protection to a class of persons apparently recognized in the Preamble, Posterity, in the absence of any opinion from this Court defining the term Posterity.

It is conceded that that both Art. I, § 8, clause 18, and the 14th Amendment, § 5, are "a positive grant of legislative power" to Congress to "enact necessary and proper legislation to carry out that objective. *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *Wayman v. Southhard*, 23 U.S. (10 Wheat.) 1 (1825). In *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880) and *Boerne v. P.F. Flores*, 594 U.S. 511, 517 (1997), this Court explained the scope of Congress' § 5 power in the following broad terms:

---

[4] Once a federal claim [or defense] is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

> "Whatever legislation is appropriate ... to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws ... denial or invasion, if not prohibited, is ... within the domain of congressional power."

Naturalization has been defined as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 15, 162 (1989). Given the powers granted under Art. I, § 8, clause 18 and § 5 of the 14th Amendment, and the words in the Preamble, "to secure the blessing of liberty to ourselves and our Posterity" it would appear, *see infra*, that Congress could "adopt [Posterity, the conceived unborn,] and cloth[e them] with the privileges of a ... citizen," until they are born.

Thus, there is squarely presented a tension between this Court's decision in *Roe v. Wade*, and its progeny, regarding the rights of Women under the 14th Amendment (*See, e.g., Planned Parenthood v.* Casey, 505 U.S. 833 (1992)), and Congressional power under Clause 4 to regulate naturalization by "adopt[ing Posterity, the conceived unborn,] and cloth[ing them] with the privileges of a ... citizen," until they are born, an issue arising under the Preamble, to which the High Court has never spoken.

Given the right of Congress to "secure the blessings of liberty for ourselves and our Posterity", and clause 4 power to regulate naturalization, an important and compelling federal question is presented as to whether deference should be given to the Congressional authority to abolish what it considers contrary to the principles found in the Constitution for the protection of human life.

II.

AN IMPORTANT AND COMPELLING FEDERAL QUESTION IS PRESENTED AS TO WHETHER *STARE DECISIS* SHOULD APPLY TO ROE AND ITS PROGENCY WHERE THIS COURT FAILED TO CONSIDER THE TERM "POSTERITY" IN THE PREAMBLE

Statutes or practices inconsistent with the Constitution, however pervasive, cannot create a power that the Constitution does not bestow, nor furnish a construction that the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649 (1891); 3 Rotunda, TREATISE ON CONSTITUTIONAL LAW § 23.33, p. 512 (1986). The High Court invalidated in part its own Rules of Court, which were in part based on a Congressional Statute requiring attorneys to take an oath with respect to their activities before the end of the Civil War, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte* Garland, 71 U.S. (4 Wall.) 333 (1867). Faced with the constitutionality of "separate but equal" facilities, a practice in existence throughout the south, and sanctioned by the High Court for 58 years, the Court nonetheless correctly overruled *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown 1). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues that need to be resolved, the Court has not allowed the fact that some issues were not properly addressed in the courts below to prevent further argument on the issues omitted so that the continuing controversy could be settled. Brown I, 347 U.S., at 489, 496; *Brown v. Board of Education.*, 349 U.S. 294, 298 (1955) (*Brown II*) (for remedy).

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) this Court noted that Roe[5] stood at the intersection of two lines of decisions. One, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), are those cases which found a right to privacy in which the state had no right to interfere with personal choices regarding sex,[6] family, and whether to bear and beget children. Casey, 505 U.S., at 857. The other line of cases found there exists a certain individual autonomy that limited governmental power regarding medication and the right to die, which supports the *Roe* conclusion. *Ibid.* The Case plurality suggests that Roe might be *sui generis*, i.e., one of a kind, but since there had been no erosion of its central premise, noting the change in membership and squabbling among the justices, even

---

5 Interestingly, the Roe citations in support of a woman's right to privacy simply do not support an absolute right to privacy. Indeed, in what appears now to be a false first step, the High Court observed the right to privacy was first noted in 1891, citing a case that had nothing to do with a constitutional issue. *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *but cf, Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1940). *Sibbach* teaches that *Botsford* was not a substantive rule of constitutional law of privacy, but rather, one of statutory construction. In 1891, there was no authority for a physical examination of a plaintiff, a legislative omission cured by the Federal Rules of Civil Procedure, Rule 35, which was no affront to privacy because the plaintiff voluntarily advanced the issue by bringing suit.

6 The court has not been consistent with respect to sex. For instance, in *Bennis v. Michigan*, 516 U. S. 442 (1996), a man engaged in sexual intercourse with a prostitute in the family vehicle, was caught, and the vehicle subjected to forfeiture, but the wife of the man could not redeem her community property interest, notwithstanding she had no knowledge of the act. No case has held that a woman, based on her right to privacy, can do anything she wishes with her body. Acts of prostitution, even in the privacy of her own bedroom, may be in violation of state law and said law is still constitutional. *A fortiori*, if unborn and partially born children are persons in the constitutional sense, it is not possible that a woman has an absolute right to take the child's life. Finally, the fact of pregnancy is obvious to all who see the pregnant woman, and what one exposes to public view is not private. *Katz.*

if the court were to assume error by Roe, "it only went to the strength of the state interest in fetal protection, not to the recognition by the Constitution of the woman's liberty." *Casey,* 505 U.S., at 858-59. The soundness of Roe, said the *Casey* Court, was apparent from a consideration of the alternative. "If indeed, the woman's interest in deciding whether to bear and beget a child had not been recognized in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey,* 505 U.S., at 860. After a review of *stare decisis,*[7] the lack of anything new regarding the status of unborn children, and in view of widespread reliance, *Casey* abandoned *Roe's* trimester periods, and affirmed both women's rights and the "State's interest in protecting human potentiality" after viability, provided there was no undue burden on a woman's choice. *Ibid.*

Casey begs important questions. The central issue is not whether a woman has a right to decide whether to beget children; of course she does. And of course there is no issue as to termination of a pregnancy; all pregnancies will terminate at the end of term, by natural birth, caesarian section, or otherwise. The issue *is:* whether a woman has the right to choose to terminate a pregnancy to terminate the life of an unborn or partially born child once begot. The Roe Court reached the result it did because, it said, Texas had failed to demonstrate where in the Constitution unborn children were Constitutional persons. 410 U.S., at 157-59.[8] *Casey* perpetuates the Roe error on the basis

---

[7] Justice O'Connor conceded there was an erosion of support by the justices as to the continued validity of Roe.

[8] A reading of the Petition, Response, and Briefs by the parties and Amici in Roe shows the primary focus was on the term person as found in the 5th and 14th Amendments. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.

there has been no development in constitutional theory that undermines the Roe premise. Neither opinion addresses the term "Posterity"[9] in the Preamble, nor its meaning. Furthermore, there has been a growing recognition that the High Court erred. COMMENTS, TO BE AND NOT TO BE: INCONSISTENCIES IN *THE LAW* REGARDING THE LEGAL STATUS OF THE UNBORN FETUS, 71 Temple Law Review 963, 994 (1998) (hereinafter, To Be and Not to Be.); Notes, Fourteenth Amendment Personhood; Fact or Fiction?, 73 St. John's Law Review 495, 530-40 (1999) (hereinafter, *Fourteenth Amendment* Personhood); LYNCH I, *supra*; LYNCH II, *supra*.[10]

This court can judicially notice the impact on the judiciary by abortion cases, and that the High Court's opinions have been heavily criticized as being unsound in principle and unworkable in practice. *To Be and Not to Be;* Fourteenth Amendment Personhood, supra ("our judiciary is dishonest in its treatment of fetuses"); Lynch I and II, *supra*. Similarly, it is well known that the abortion controversy has led to disorder in the streets throughout the country.[11] Moreover, beginning with *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-519 (1989) (Rehnquist, Ch. J., dissenting), this Court has increasingly found Roe to be unsound in principle and unworkable in practice. The most critical voice of this court's position came from this Honorable Court's Justice Scalia in dissent in *Stenberg v. Carhart*, 530 U.S. 914, 953

---

[9] Douglas, J., mentioned "liberty" in the Preamble, but that was hardly an exposition on the meaning of "Posterity" in the Preamble.

[10] Notwithstanding widespread availability in print, and on the web, no article has ever purported to demonstrate the unsoundness of the approach taken in either Lynch I or Lynch II.

[11] It is not suggested that this disorder is the reason for overruling *Roe*. Quite the contrary, the reason is unborn and partially born children are persons who are present members of "Posterity" in the Preamble of the Constitution. The mention of this problem is but recognition that the problem must be resolved.

(2000).[12] A proper reading of the Preamble, *in pari materia* with the body of the Constitution, leads to this realization:

A person is created at conception. Preamble.
A person is a citizen at birth. 14th Amend., § 1.
A person can vote at age 18. 26th Amend., § 1.

Even prior to the adoption of the Partial Birth Abortion Act, Congress has not been silent. In 2002, it adopted definitions for "person," "human being," "child," and "individual" as including "born-alive infants." 1 U.S.C., § 8.[13] The adoption of the section goes beyond the definition to recognize and preserve

---

[12] "The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd."

[13] Sec. 8. "Person", "human being", "child", and "individual" as including born-alive infant

"(a) In deter mining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

"(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

"(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section." [Added Pub. L. 107-207, Sec. 2(a), Aug. 5, 2002, 116 Stat. 926.)

the common law rights[14] of "any member of the species homo sapiens at any point prior to being "born-alive"" as defined within that section. Id, § 8(c).

Thus, in light of the above, an important and compelling federal question is presented as to whether, in light of this Court's retreat from *Roe v. Wade*, 410 U.S. 113 (1973), and in light of the arguments to follow, this Court should *distinguish Roe* and its progeny from this case, and remand for further proceedings in light of the fact that unborn and partially born children are present members of "Posterity" in the Preamble, thus persons entitled to protection; or remand for consideration by the lower courts as to whether unborn and partially born children are present members of "Posterity" entitled to protection.

III.

AN IMPORTANT AND COMPELLING FEDERAL QUESTION IS PRESENTED AS TO WHETHER UNBORN, AND PARTIALLY BORN, CHILDREN ARE PERSONS BY VIRTUE OF THEIR INCLUSION AS PRESENT MEMBERS OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Neither the 5th Amendment nor the 14th Amendment defines personhood. The 14th Amendment only defines citizenship.[15] In other contexts, the court has held that aliens,[16] and artificial persons[17] are persons entitled to Constitutional protection. Not to recognize

---

[14] 1 Blackstone, Commentaries on the Law of England, p. 126; Appendix A6: "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. ...." Id, p. 126.

[15] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof ..."

[16] *E.g., Hampton v. Mow Sun Wang*, 426 U.S. 88 (1976); Const., Art. VI, Treaty Clause; McKechnie, *Magna Carta*, Art. 41 (Aliens).

[17] *See, Chicago B. & Q. R.R. Co. v. Iowa*, 94 U.S. 155 (1877); *E.g., Land v. Dollar*, 330 U.S. 731 (1974) (*Replevin*; Stock taken under color of federal law).

the unborn and partially born children as persons is therefore an anomaly.[18] As "Person," is used without qualification, the most logical place to look for meaning is the Preamble,[19] because while its purpose is not to create rights,[20] it does define for whom the rights were created.[21] The Preamble. reads:

> "We, the People of the United States, in Order; to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

The words "people of the United States" and "citizens" are synonymous terms.[22] The Preamble creates

---

[18] At common law, the unborn were recognized as a person with substantial rights. 1 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Chapter 1, p. 126; Appendix B1-B2. *See also infra*, footnote 29.

[19] The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, 1 Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elders of Israel met with David at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. The *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[20] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto) 542, 549. The 13th & 14th Amendments do not overrule *Scott*, but only remove the limitations found in Article I, thus enlarging the class of persons who are citizens.

[21] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto), 542, 549.

[22] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); *Cruikshank, supra*, 92 U.S. (2 Otto), at 549.

two classes of sovereignty, "ourselves" and "our Posterity."[23] Its purpose appears to be to include "Posterity[24] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, 'Posterity" as to those who are lives in being is synonymous, if not with "citizenship,"[25] surely "personhood."[26] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[27] In 1644, Milton argued that the, "Parliament could no more censure the issue of the mind than it could the issue of the womb."[28] At common law, certain members of future generations, unborn and partially born children,[29] were lives in being for the purposes of the Rule Against Perpetuities.[30] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[31] and it does not appear

---

[23] Lynch I, etc, supra, at page 1.

[24] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[25] See footnote 9, *ante*. It is probably more accurate to say the conceived unborn, partially born, children are persons who become a naturalized citizen (§ I, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[26] Supra, at footnotes 20 and 25, and page 11, following "*pari materia*."

[27] Lynch I, , etc. supra, at page 1

[28] Milton, AREOPAGITICA (1644).

[29] Ante at footnote18; Aristotle, Politics, VII, I335b, 24-26; Aquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. Exodus 21:22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington* Dept of Social Svcs for the Blind, 474 U.S. 481 (1986). See also, fn 31, infra.

[30] Gray, THE RULE AGAINST PERPETUITIES (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180,6 Cal.Rptr. 272 (1960).

[31] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them. Lord Coke, repeated by

that tort actions for the injuries were barred.[32] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation, a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration of Independence[33] and the concept of an "indestructible and perpetual union,"[34] whereas if construed as a fee tail,[35] it would be consistent with an intent to create

---

Blackstone, at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." Magna Carta (1215), Art. 54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) Medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[32] *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill, supra*, 205 P. 917 (1922)); Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135. And it appears that at a minimum, these common law rights were intended by Congress to be preserved. 1 U.S.C., § 8(c) , Appendix C.

[33] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that Governments are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

[34] *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) construing Preamble.

[35] *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward* v. Howe, 12 Gray (Mass.) 49 (1858); *Gannon* v. *Athright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31(1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926); 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911), (recognizing by *dictum* common law rule). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (forfeitures); Art. IV, Sec. 2, cl. I (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of. . . property. . . nor shall private property be taken. . . .")

"unalienable rights" and a "perpetual union,"[36] for the protection of future generations, including unborn and partially born children.

The Constitution was submitted to the People for ratification.[37] Implicit in the Preamble is the concept that the Constitution is to be a social contract[38] wherein society promises the individual unalienable rights, in return for which the individual promises to conform to the laws of society that do not derogate[39] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[40] As persons under the age of Capacity[41] could not consent,[42] it appears the framers intended adults to be of the class "ourselves," and all others, including lives in being, unborn and partially born children, of the class "Posterity."[43]

Taking the approach that unborn and partially born children are present members of "Posterity" answers a number of theoretical problems. *Casey, supra*, 505 U.S. at 860. (O'Connor, J.) First, it is further develop-

---

[36] 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh*, F.W. & C.R. Co., 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, aff'md 222 U.S. 16 (1911) (Recognized by dictum common law rule).

[37] 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196,209, 565, 582, 590,651; 3 Rotunda, op cit., p. 663, note 1. Appendix A.

[38] E.g., Hobbes, LEVIATAN (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE HUMAN RIGHTS READER (1979).

[39] Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937); Id, *Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL. 55 (1966).

[40] Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym., 909 (1703)(English Reports).

[41] "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State account of age." 26th Amend, § 2.

[42] Chitty on Contracts.

[43] 2 Stephens Commentaries 342 (1841) .

ment of constitutional theory recognizing there is not just one right, or more precisely - life, at stake, but two, the mother's, a member of "ourselves," and her unborn or partially born child's, a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her unborn or partially born child is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives. Fourth, it assures a woman's right to seek medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts out of the quagmire of trying to guess when unborn and partially born children become "viable" and therefore entitled to protection. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

In light of the above, an important and compelling federal question is presented as to whether this Court should now consider, and decide, whether the unborn are members of Posterity.

IV.

AN IMPORTANT AND COMPELLING FEDERAL QUESTION IS PRESENTED AS TO WHETHER THE GOVERNMENT HAS A RIGHT TO PROTECT UNBORN AND PARTIALLY BORN CHILDREN

The Constitution Provides, in relevant part:

"No person shall be ... deprived of life ... without due process of law." U.S. Const, 5th Amendment.

Neither a State nor the federal government may utilize tax money to take life without due process of law.[44]

---

[44] Under international law, a state has the obligation to provide police protection for its citizens at home. (Verdross, *Forbidden Treaties International Law*, 31 AJIL 571 (1937); Verdross, *Jus Dis-*

E.g., Flash v. Cohen, 392 U.S. 83 (1968). Assuming, *arguendo,* that unborn and partially born children are present members of "Posterity," they have a right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill, supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §* 132, 135 (1st ed, 19[illegible]o be heard on the question as to whether their li[illegible]hould be terminated. *See generally, Midlane v. Central Hanover Bank*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it progeny; *Cruikshank,* supra, 92 U.S. (2 Otto), at 549; I Blackstone, Commentaries on the Law of England, p. 126, Appendum A6.

Unborn or partially born children have all of the characteristics of life.[45] See generally, *To be and not to be* , supra; Fourteenth Amendment Personhood, supra, 72 St. John's L.R., at 534-39; Lynch I, supra; Lynch II, supra. Whether or not it can be ascertained at any point in time that unborn or partially born children are human is absurd;[46] if the parents are human they cannot be anything but human.[47]

---

positivum & Jut Cogens in International. Law, 60 AJIL 55(1966)). Protecting an individual through due process in American jurisprudence is derived from the *Magna Carta* (1215) . *Murray's Lessee v. Hoboken Land & Improvement* Co., 59 U.S. (18 How.) 272 (1856). McKechnie, *Magna* Carta; the Great Charter of King John. McKechnie is the recognized scholar on the *Magna Carta.* 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw. I *(Magna* Carta)(1297), p. 14, Notes, ¶ 2.

[45] Case & Stairs, Biology; OBSERVATION & CONCEPT (1971):, p. 110, excretion, pp. 122, 141, 143, 149-150; ingestion, pp. 70, 80; respiration, pp. 8, 51, 64, 77; irritation, pp. 267, 329, 330; reproduction, pp. 122, 163-165,298-299,327,329. A zygote has an individual developing life that is viable in *utero,* in contradistinction to the ovum and sperm, which are not. Id, pp. 324-327. See next footnote.

[46] See, *Stenberg v. Carhart,* supra, 530 U.S., at 953.

[47] The fact that the zygote is not viable extrauterine does not negate the fact of its life. All life is environmentally dependent. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut

In the case of the partially born children, the case is even more compelling. Both the evidence below, and the finding of Congress (2 Appendix to Petition, pp 589a – 598a.) demonstrate the absurdity of the proposition that a partial birth abortion somehow protects the health of the mother. Indeed, the sole difference between a birth process in which the child survives, and the partial birth abortion, is that in the later the birthing process is interrupted for the sole purpose of killing the child, before allowing the process to be completed.

Given a state's obligation to ensure life is not taken without due process of law, it appears that the state has a legitimate interest in denying the absolute right to take the life of unborn or partially born children. Its citizens, and the citizens of every state, have an interest in ensuring that there exist safeguards so that unborn and partially born children do not become victims of genocide. (E.g., *International Convention on the Prevention and Punishment of the Crime of Genocide,* Congressional Digest, December 1984; U.S. Const., Art. VI, cl. 2 (treaties).[48] Accordingly, any opinion that states otherwise is void as being repugnant to the doctrine of *jus cogens.*

In view of the foregoing, the Court should find an important and compelling federal question is presented as to whether and the right of the government to "clothe aliens with the privileges of citizenship", this

---

was a life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Similarly, a fetus securely within the womb will die if there is an abruption of the placenta. Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979), page 93.

[48] Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d Amend. (Quartering of soldiers), and 4th Amend (search and seizure); *Katz v. United* States, 389 U.S. 347 (1967), and its progeny. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes if the conduct amounts, under state law, to a crime. *Bennis v. Michigan,* 516 U. S. 442 (1996). See footnote 6, supra.

court should grant certiorari to decide whether deference to the Congressional statute banning Partial Birth Abortions, on the basis that Congress has the right to "clothe the unborn with the privileges of citizenship" until its birth.

CONCLUSION

Based upon the foregoing, this Court should grant certiorari and *distinguish* Roe v. *Wade,* 410 *U.S.* 113 (1973) and its progeny as inapposite to the questions presented herein, reverse and remand for further proceedings not inconsistent with this court's views.

RESPECTFULLY SUBMITTED,

James Joseph Lynch, Jr.*
AFFILIATE COUNSEL (CAL BAR # 85805)
THE PACIFIC JUSTICE INSTITUTE
4144 WINDING WAY, SUITE 4
SACRAMENTO, CA 95841
VOICE: (916) 485-8807
EMAIL: JJLYNCHJR@SBCGLOBAL.NET
www.jamesjosephlynchjr.com

BRAD DACUS, CEO & CHIEF COUNSEL
JAMES GRIFFITHS, ASSISTANT COUNSEL
THE PACIFIC JUSTICE INSTITUTE
P.O. BOX 276600
SACRAMENTO, CA 95827-6600

COUNSEL FOR AMICI CURIAE

*LEAD COUNSEL

APPENDIX

EXCERPTS FROM FARRAND, MAX, THE CONSTITUTIONAL DEBATES*

[129]

COMMITTEE OF DETAIL, IV

* **

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

****

VI

We the People of *(and)* the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New, Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

****

[163]

COMMITTEE OF DETAIL, IX

****

IX

---

* * Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's, which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says, "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: <a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

[196]

Tuesday MADISON

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up ...

****

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MCHENRY Augt 7

MCHENRY

Augt. 7.

****

The preamble or caption and the 1. and 2. article passed without debate ....

****

[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form a more perfect union, to establish justice. insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

****

[604]

****

THURSDAY, SEPTEMBER 13,1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and

that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

[604]

[To postpoine the report respecting the 22nd and 23rd Ayes -- 9; noes -- 1.]

****

To strike out the word "to" before establish justice Ayes—-8; Noes---2.]

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President	
	[567]	[568]	[569]
New Hampshire	Aye	Aye	aye
Massachusetts	Aye	Aye	aye
Rhode Island	Aye	Aye	aye
Connecticut	Aye	Aye	aye
New York	Aye	Aye	aye
New Jersey	Aye	Aye	aye
Pennsylvania	Aye	Aye	aye
Delaware	Aye	aye	aye
Maryland	Aye	aye	no
Virginia	Aye	aye	aye
North Carolina	Aye	aye	aye
South Carolina	Aye	dd	aye

Georgia Aye aye aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ...

****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

****

1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND

"*****

"An infant in *ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to *it*. It may have a guardian of *aſſigned* to it[4]; and it is enabled to have an eſtate limited to it's uſe, and to take afterwards by ſuch limitation, as if it mere then actually born. And in this point the civil law agrees with ours.

"2. A MAN'S limbs, (by which for the preſent we only underſtand thoſe members which may be uſeful to him in fight, and the loſs of which only amounts to mayhem by the common law) are alſo the gift of the wiſe creator; to enable man to protect himſelf from external injuries in a ſtate of nature. To theſe therefore he has a natural inherent right; and they cannot be wantonly deſtroyed or diſabled without a manifeſt breach of civil liberty.

"*****"

[Footnotes omitted]